



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 29, 1995

Ms. Phoebe Knauer
Director, Information Release
Texas Employment Commission
101 E. 15th Street, Room 651
Austin, Texas 78748

OR95-302

Dear Ms. Knauer:

You have asked this office to determine if certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 31027.

The Texas Employment Commission (the "commission") received a request for the following:

1. Anderson Consulting's proposal to the Texas Employment Commission for the U.I. Benefits Redesign Project.
2. [The commission's] purchase order to Anderson Consulting with any attachments at the time of issue and modifications since the time of issue.

In addition, we would like to know if the product of this contract (program design documentation and source code) will be in the public domain and therefore available to other governmental entities and vendors.

According to information supplied this office, only the proposal is at issue. Since Anderson Consulting ("Anderson") informed the commission that it did not want the proposal released, you have asked this office to determine if the proposal must be disclosed under section 552.305 of the Government Code. Section 552.305 provides:

(a) In a case in which information is requested under this chapter and a third party's privacy or property interests may be involved, including a case under Section 552.101, 552.104, 552.110, or 552.114, a governmental body may decline to release the information for the purpose of requesting an attorney general decision.

(b) A person whose interests may be involved under Subsection (a), or any other person, may submit in writing to the attorney general the person's reasons why the information should be withheld if released.

(c) The governmental body may, but is not required, to submit its reasons why the information should be withheld or released.

Pursuant to section 552.305(b) of the Government Code, this office notified Anderson of the request for information and offered Anderson an opportunity to address the availability of the proposal at issue. Anderson contends that the proposal is excepted from disclosure under sections 552.104 and 552.110. We will address Anderson's arguments under both sections 552.104 and 552.110.

Section 552.104 excepts "information that, if released, would give advantage to a competitor or bidder." Anderson asserts that release of the proposal will provide an unfair advantage to its competitors in future bidding situations. However, the purpose of section 552.104 is to protect a *governmental body's* interests in a specific commercial situation by keeping some of the bidders from gaining unfair advantage over other bidders. Open Records Decision No. 541 (1990) at 4. Generally, neither the contract nor related information is excepted from disclosure under section 552.104 once the bidding process is over and a contract awarded. *Id.* at 5.

In Open Records Decision No. 541 (1990), the railroads who were parties to the contract and their main competitor all agreed that disclosure of the requested information would harm the parties' competitive interests on similar contracts. However, we stated that the "broader competitive interests" of the successful bidders are interests that are simply not addressed by section 552.104. *Id.* at 5. Section 552.104 will not operate to except this information once the bidding process is over and the contract has been awarded. Since it is our understanding that the contract has already been awarded to Anderson, the proposal may not be withheld under section 552.104.

Anderson also asserts that portions of its proposal are excepted from disclosure as trade secrets under section 552.110 of the Government Code. In *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958), the Texas Supreme Court adopted the definition of trade secret from section 757 of the Restatement of Torts. Section 757 provides that a trade secret

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939).

This office must accept a claim that information is excepted from disclosure as a trade secret if a prima facie case is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 592 (1991) at 2. However, when a governmental body or company fails to provide relevant information of the trade secret factors necessary to establish a trade secret claim, this office cannot conclude that the trade secret prong of section 552.110 applies. Open Records Decision No. 402 (1983). The Restatement lists six factors that should be considered in determining whether information constitutes a trade secret:

(1) the extent to which the information is known outside [the owner's] business; (2) the extent to which it is known by employees and others involved in [the owner's] business; (3) the extent of measures taken by [the owner] to guard the secrecy of the information; (4) the value of the information [to the owner] and to [its] competitors; (5) the amount of effort or money expended by [the owner] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS, *supra*.

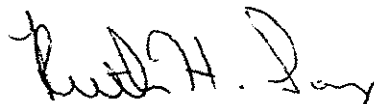
Anderson has established a prima facie case that its system development methodology (METHOD/1), Quality Management Planning techniques (QVS), and DESIGN/1 project management tools are trade secrets. Anderson states that it maintains this information as confidential by copyrighting the information; allowing access to employees only on a need to know basis; and having in place strict company policies

prohibiting disclosure. Anderson indicates that this information, which was developed by Anderson, has not been made public and would provide competitors an advantage in other catalogue or security agency procurement situations.¹

Anderson also asserts that pricing information in the proposal is a trade secret. The pricing information submitted to this office includes the hourly rates and cost of the project for which Anderson was awarded a contract from the Texas Employment Commission. This does not appear to be the type of information for which trade secret protection is afforded. Pricing proposals may be withheld under section 552.104 during the bid submission process, but may not generally be withheld under section 552.110. Open Records Decision No. 319 (1982) at 3.²

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Government Section

RHS/MAR/rho

Ref.: ID# 31027

Enclosures: Marked documents

cc: Mr. Paul J. Phillips
Client Executive
IBM
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(w/o enclosures)

¹Neither you nor Anderson marked the portions of the proposal for which trade secret protection was asserted. We have reviewed and marked the information that we can determine falls within the sections for which Anderson has made its prima facie case.

²We note that information concerning the expenditure of public funds on a project is generally public. Gov't Code § 552.022(3).

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